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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 08/27/2013
RUTH A. WILLINGHAM,
CLERK
BY: GH

ROSS READ, a married individual,) No. 1 CA-CV 12-0007
)
Plaintiff/Appellant/) DEPARTMENT E
Cross-Appellee,)
) **MEMORANDUM DECISION**
v.) (Not for Publication -
) Rule 28, Arizona Rules of
BRITTINI ALEXA KEYFAUVER,) Civil Appellate Procedure)
)
Defendant/Appellee/)
Cross-Appellant.)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-050444

The Honorable Michael D. Gordon, Judge
The Honorable Linda H. Miles, Judge

AFFIRMED

Friedl Richardson	Phoenix
By Thomas M. Richardson and Raechel R. Barrios	
And	
Knapp & Roberts, PC	Scottsdale
By David L. Abney	
Co-Counsel for Plaintiff/Appellant/Cross-Appellee	
DeCiancio Robbins PLC	Tempe
By Joel DeCiancio and Christopher Robbins	
And	
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By Diane M. Lucas and Michael S. Ferraro	
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B R O W N, Judge

¶1 Ross Read, a law enforcement officer, was injured while providing assistance to Brittini Alexa Keyfauver, who was trapped in a vehicle because of a rollover accident. In a subsequent lawsuit, the superior court granted Keyfauver's motion for summary judgment, finding that Read's claim was barred by the firefighter's rule. In a separate opinion filed herewith, we address Read's appeal of the court's summary judgment ruling. Here, we address Kefauver's cross-appeal, in which she asserts we lack jurisdiction to consider Read's appeal. For the following reasons, we conclude that we have jurisdiction.

BACKGROUND

¶2 The superior court granted Keyfauver's motion for summary judgment in an unsigned minute entry filed January 21, 2011. Read moved for a new trial.¹ At oral argument, the

¹ In the same filing, Read also requested that the minute entry granting summary judgment be vacated pursuant to Rule

superior court denied that motion on the record and signed a judgment (submitted by Keyfauver) on June 29, 2011 ("Judgment of Dismissal"). The minute entry corresponding to the oral argument hearing, filed on July 1, 2011, reflected that the court had denied the motion for new trial. The minute entry also indicated that the court "approv[ed] and settl[ed] Defendant's Judgment of Dismissal, as modified, electronically signed by the Court June 29, 2011 and filed (entered) by the clerk June 29, 2011."²

¶3 In mid-July, Read and Keyfauver lodged separate notices and forms of judgment for the court's signature. The court eventually entered Read's form of judgment on October 31, 2011, which dismissed the case and denied the motion for new trial. On November 28, 2011, Read filed a notice of appeal from the October 31 judgment.

¶4 After Read filed his opening brief, Keyfauver filed a motion to dismiss the appeal for lack of jurisdiction. Keyfauver asserted the Judgment of Dismissal was a final appealable order from which Read was required to appeal. Keyfauver therefore argued our court lacked jurisdiction over

60(c). For ease of reference, we refer to the document as the motion for new trial.

² The Judgment of Dismissal was signed physically, not electronically.

the appeal because Read failed to timely file his notice of appeal.

¶15 In response, Read's counsel attached affidavits alleging they never noticed the Judgment of Dismissal attached to a statement of costs filing and did not receive any notice of filing a judgment of dismissal. Counsel also asserted they never saw an electronic filing of a document titled "Judgment of Dismissal." They avowed further that after inquiring into the matter with superior court personnel, counsel for Read was told that no judgment had ever been filed. This is why, according to Read's counsel, they filed a proposed form of judgment following the Judgment of Dismissal. Counsel for Read further asserted they periodically checked the docket and never noticed a judgment filed until November 2, after which they acted promptly to file a notice of appeal. Finally, counsel avowed that the first time they saw the Judgment of Dismissal was in March 2012 and that despite the "CC:" on the order, they never received a copy.

¶16 Addressing Keyfauver's motion to dismiss, this court's motions panel suspended the appeal and revested jurisdiction in the superior court so it could "consider a motion pursuant to Rule 60(a)." Read moved for relief from the Judgment of Dismissal, alleging the judgment had not been mailed to him and did not appear in the superior court docket system. Read

claimed there had been a "series of clerical mistakes and errors arising from oversight or omission," which resulted in the ineffective transmittal and receipt of the Judgment to counsel. Keyfauver countered that Read had "been informed both orally and in writing that a final, appealable 'Judgment of Dismissal' had been signed and filed[.]" She argued that a court's ability to alter or amend a judgment after entry of final judgment would be inconsistent with the policy favoring finality of judgments. Judge Gordon³ concluded a clerical error had occurred, vacated the Judgment of Dismissal, and affirmed the October 31 judgment as the final, appealable judgment.

¶17 Keyfauver filed a motion for clarification with this court, asserting the superior court had no authority to vacate the Judgment of Dismissal under Rule 60(a), and requesting clarification about whether our court would rule on the motion to dismiss, and whether we intended to set a due date for briefing. Based on the motion, we concluded a Rule 60(c) motion would have been more appropriate and therefore we suspended the appeal and revested jurisdiction in the superior court to consider a Rule 60(c) motion for relief.

³ Judge Miles, who was originally assigned to the case, had been transferred to another division of the superior court. Judge Gordon was then assigned this case and ruled on the various motions as to whether Read could file a delayed appeal.

¶18 In anticipation of Read's Rule 60(c) motion, Keyfauver filed a motion in the superior court to transfer any Rule 60(c) motion from Judge Gordon to Judge Miles, the judge who ruled on the motions for summary judgment and Read's new trial motion in the first instance. Thereafter, Read filed a motion for relief, arguing that relief was warranted under Rule 60(c)(1), (4), and (6).

¶19 Judge Gordon denied Keyfauver's motion to transfer consideration of the Rule 60(c) motion to Judge Miles and granted Read's Rule 60(c) motion, which vacated the Judgment of Dismissal. Judge Gordon concluded that under Rule 60(c)(6), extraordinary circumstances existed to warrant vacating the Judgment. He also found that vacating the judgment was not to avoid the six-month requirement set out in Rule 60(c)(3). Finally, Judge Gordon stated "[w]hile the Court has considered factors that are relevant to subsection 3, it is the aggregation of those circumstances plus the latent judicial error that makes this case extraordinary." Our court reinstated Read's appeal from the October 31 judgment and denied without prejudice Keyfauver's motion to dismiss the appeal, noting that we would reconsider the motion if Keyfauver filed a timely cross-appeal, which she has done.

DISCUSSION

¶10 Keyfauver challenges the superior court's rulings that permitted Read to file a delayed appeal on the grounds that his counsel did not receive timely notice of the Judgment of Dismissal. She therefore urges us to dismiss the appeal for lack of jurisdiction.

¶11 Keyfauver first contends Judge Gordon abused his discretion by refusing to transfer consideration of the Rule 60(c) motion to Judge Miles. Keyfauver relies on *Lemons v. Superior Court in Gila County*, 141 Ariz. 502, 687 P.2d 1257 (1984), asserting that Judge Miles should have ruled on the motion because "[w]hen a final judgment is involved one superior court judge has no jurisdiction to review or change the judgment of another superior court judge." 141 Ariz. at 504, 687 P.2d at 1259. We find *Lemons* distinguishable. In that case, our supreme court accepted special action jurisdiction to determine whether one judge "had jurisdiction to decide the same motion previously decided by a different judge of the superior court[.]" *Id.* at 504, 687 P.2d at 1259. In this case, Judge Gordon was not deciding any motion that Judge Miles had ruled on, nor did his rulings have any substantive effect on the merits of the case or the content of the Judgment of Dismissal. Judge Miles never considered or ruled on a Rule 60 motion that was directed toward vacating the Judgment of Dismissal.

¶12 Keyfauver also cites *Hibbs v. Calcot, Ltd.*, 166 Ariz. 210, 801 P.2d 445 (App. 1990), claiming that Arizona courts “frown upon the practice of a second judge reviewing the rulings of a first judge who has heard the case from start to finish[.]” Keyfauver’s reliance on *Hibbs* in support of her general request for us to dismiss this appeal, however, is misplaced. Although this court “comment[ed] with disfavor” on the practice of permitting one trial judge to review another trial judge’s ruling, the court still proceeded to decide the substantive issues presented by the case. *Id.* at 214, 801 P.2d at 449. Thus, notwithstanding its expression of concern about that practice, the court nonetheless determined the merits of the case.

¶13 Additionally, in *Hibbs* we recognized that Maricopa County Superior Court judges are periodically reassigned to handle different court calendars, as was the case here. *Id.* As we noted in *Hibbs*, post-judgment motions should be rerouted to the original judge. *Id.* However, we recognize that transferring a case to the original judge may not always be practical. *See id.* Extenuating circumstances may limit judicial resources requiring flexibility in the superior court’s administrative processes, including assignment of cases. *See id.* Thus, we are not persuaded the supreme court or this court intended the broad interpretation Keyfauver suggests.

Especially in the context of Rule 60(c) motions, we defer to the superior court's administrative processes and scheduling.

¶14 Keyfauver argues Judge Gordon erred in granting Read's Rule 60(c) motion "in the absence of extraordinary circumstances." We review a superior court's judgment arising from a Rule 60(c) motion for an abuse of discretion. *City of Phoenix v. Geyler*, 144 Ariz. 323, 328, 697 P.2d 1073, 1078 (1985). We will affirm the superior court's decision "where any reasonable view of the facts and law might support the judgment of the trial court." *Id.* at 330, 697 P.2d at 1080.

¶15 Rule 60(c) provides that "[o]n motion and upon such terms as are just the court may relieve a party . . . from a final judgment . . . for . . . any other reason justifying relief from the operation of the judgment." Ariz. R. Civ. P. 60(c)(6). A trial court can use the rule to vacate and reenter a judgment so as to allow a delayed appeal. *Haroutunian v. Valueoptions, Inc.*, 218 Ariz. 541, 549, ¶ 20, 189 P.3d 1114, 1122 (App. 2008). A moving party, however, has the burden to demonstrate extraordinary circumstances warranting relief from the judgment. A party must show (1) lack of notice that the judgment had been entered; (2) lack of prejudice to the non-moving party; (3) that it promptly filed a motion after actual notice; and (4) that it exercised due diligence, or had a reason for the lack thereof, in an attempt to ascertain the date of the

decision. *Geyler*, 144 Ariz. at 328, 697 P.2d at 1078. A party must also show "extraordinary," "unique," or "compelling circumstances." *Id.* at 333, 697 P.2d at 1083.

¶16 Although the superior court did not explicitly address each of these factors, the record in this case demonstrates there was no abuse of discretion when the superior court granted Read's request for Rule 60(c) relief. Read's counsel avowed they did not find out the Judgment of Dismissal had been entered until Keyfauver filed her motion to dismiss this appeal, after which Read promptly filed his motion for relief from judgment. Despite diligent efforts to check the docket, the docket did not reflect the filing of any judgment until after entry of the October judgment. And, the fact that both parties filed proposed forms of judgment following the Judgment of Dismissal undercuts any claim that Keyfauver was prejudiced by permitting Read to proceed with a delayed appeal.

CONCLUSION

¶17 For the foregoing reasons, we affirm the superior court's grant of Read's Rule 60(c) motion vacating the Judgment of Dismissal.

_____/s/_____
MICHAEL J. BROWN, Judge

CONCURRING:

_____/s/_____
PATRICIA K. NORRIS, Presiding Judge

_____/s/_____
JOHN C. GEMMILL, Judge